No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, PETITIONER

v.

JANE FELIX; B.N. COONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATT BEVIN, AND PAUL R. LE PAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Like the federal government, States, counties, and municipalities have historically included, or allowed private parties to include, religious text and symbols on monuments and other displays on public property. The amici States of Texas, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, by and through Governor Matt Bevin, and Paul R. Le Page, Governor of Maine, have an interest in maintaining that practice, consistent with the Establishment Clause.

The absence of a clear Establishment Clause test, even in the subset of cases involving Ten Commandments displays, encourages costly and time-consuming litigation against governmental entities and actors. Amici seek freedom to erect, authorize, and maintain constitutional displays on government property without the ongoing threat of wasteful litigation. They therefore file this brief in support of certiorari.*

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to clarify its Establishment Clause doctrine in at least one common context, if not more broadly. Depictions of the Ten Commandments appear on public property throughout the country and have been the subject of

* In accordance with Rule 37.2(a), the parties' counsel of record received timely notice of the amici States' intent to file this brief and consented to its filing.

several notable lawsuits, including two that this Court resolved in 2005. Those decisions are emblematic of the current state of Establishment Clause jurisprudence. They relied on different legal analyses to reach different outcomes, increasing confusion in lower courts about what the Establishment Clause prohibits and what it permits.

The confusion stems in large part from the Establishment Clause test the Court announced in *Lemon v. Kurtzman*, under which a challenged statute "must have a secular legislative purpose," must not have the "principal or primary effect" of "advanc[ing] []or inhibit[ing] religion," and "must not foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 674 (1970)). The Court should jettison that test, which leads lower courts to engage in analysis far afield from the text, purpose, and history of the Establishment Clause. It should also abandon reliance on a "reasonable observer" standard. Finally, the Court should adopt a coercion-based test that will facilitate reliable application by lower courts and yield predictable results for litigants.

ARGUMENT

I. Pervasive Uncertainty About Establishment Clause Doctrine Warrants Certiorari Review.

Lower courts have struggled to comply with this Court's pronouncements in Establishment Clause cases. *E.g.*, *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008); *Skoros v. City of N.Y.*, 437 F.3d 1, 13 (2d Cir. 2006). This Court has taken different approaches in

different factual settings, and agreement on a global mode of analysis has remained elusive. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (stating that "the Establishment Clause . . . cannot easily be reduced to a single test" because "[t]here are different categories of Establishment Clause cases, which may call for different approaches"); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (addressing factors unique to the elementary- and secondary-school setting). As Judge Easterbrook has put it, "[i]f the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (dissenting opinion).

Uncertainty persists even in the seemingly narrow subset of Establishment Clause cases involving Ten Commandments displays, as reflected by two decisions that this Court handed down at the end of the 2004 Term. In *McCreary County v. ACLU of Kentucky*, a bare majority required removal of a depiction of the Ten Commandments in a county courthouse. 545 U.S. 844, 881 (2005). But in *Van Orden v. Perry*, Justice Breyer's controlling opinion concurring in the judgment allowed a Ten Commandments monument to remain on the grounds of the Texas Capitol. 545 U.S. 677, 705 (2005); *see id.* at 692 (plurality opinion).

If *McCreary* and *Van Orden* had been decided under a common rationale, with the cases' distinct facts illuminating proper Establishment Clause analysis of

Ten Commandments displays in close cases, then perhaps the current confusion would not exist. But despite the simultaneity of the decisions, the Court followed distinct analytical paths that lower courts have struggled to reconcile.

In *McCreary,* 545 U.S. at 861–81, the majority opinion grounded its analysis in the Establishment Clause test announced in *Lemon*. But in *Van Orden*, the plurality opinion stated that the *Lemon* test was "not useful in dealing with the sort of passive [Ten Commandments] monument that Texas has erected." 545 U.S. at 686. And Justice Breyer's opinion concurring in the judgment allowed the monument to remain standing through an "exercise of legal judgment" based on the "basic purposes of the First Amendment's Religion Clauses themselves," rather than "a literal application of any particular test." *Id*. at 700, 703–04.

As at least two current Justices have noted, *McCreary* and *Van Orden* increased uncertainty in the lower courts about how to properly adjudicate Establishment Clause claims. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 15–16 & nn.3–6 (2011) (Thomas, J., dissenting from the denial of certiorari); *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1244 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc). Evidence of that uncertainty is not hard to find. One court of appeals, for instance, has described the holdings of *McCreary* and *Van Orden* as "inconsistent." *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011). Another has noted that the controlling portion of *Van Orden* "did not explain in detail how to determine whether

a case was borderline and thus less appropriate for the typical *Lemon* analysis," leading the court to analyze the facts under both *Lemon* and *Van Orden*. *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011).

Ultimately and ideally, the Court should develop an overarching framework for Establishment Clause analysis in cases arising in a wide range of contexts. *See Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (stating a preference for "adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied").

Regardless, certiorari is warranted here to clarify the Establishment Clause doctrine that applies to a common manifestation of religion-influenced expression on governmental property—Ten Commandments displays. The Ten Commandments, which "are regarded as a significant basis of American law and the American polity," *Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003), are frequently displayed on public property. *See, e.g.*, *Van Orden*, 545 U.S. at 688–89 (plurality opinion) (describing depictions of the Ten Commandments in several federal buildings); Brief for the United States as Amicus Curiae in Support of Petitioners, Appendix, *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (No. 03-1693), 2004 WL 2831788, at *1a–6a (identifying Ten Commandments monuments on public property in most States); Jess Bravin, *When Moses' Laws Run Afoul of the U.S.'s, Get Me Cecil B. deMille*, Wall St. J., Apr. 18, 2001, at A1 (noting that "as many as 4,000 Ten Commandments monoliths [have been] erected in public spaces across the country"). An-

nouncing a reliable metric for determining the constitutionality of these displays would provide helpful guidance to a large number of lower courts, governmental actors, and potential plaintiffs.

Certiorari is also warranted here because the Ten Commandments monument that the respondents challenged shares characteristics of the displays at issue in both *McCreary* and *Van Orden*. Pet. App. 5a–8a (reflecting, for instance, that the Ten Commandments monument at issue here stands among several other unchallenged monuments and was privately funded, but that it is of relatively recent vintage and was quickly challenged on Establishment Clause grounds); *see McCreary*, 545 U.S. at 869–70; *Van Orden*, 545 U.S. at 681–82 (plurality opinion); *id.* at 701–02 (Breyer, J., concurring in the judgment). A clear decision in this case would allow lower courts to focus only on facts material to the required legal analysis, preventing a minor "tweak of the facts (or of the reviewing jurist's nose) [from] result[ing] in a different conclusion." Pet. App. 38a (district court's opinion).

Finally, litigation over the Establishment Clause in general, and Ten Commandments displays in particular, has produced a robust body of judicial and academic opinions, giving the Court a range of critically evaluated options for clarifying its analytical approach. Further percolation would yield little benefit, if any, and denying certiorari would leave lower courts and litigants without needed guidance.

II. The Court Should Take This Opportunity to Jettison the *Lemon* Test.

The *Lemon* test has no shortage of critics. *See, e.g.*, *Green*, 574 F.3d at 1244 nn.1, 2 (Gorsuch, J., dissenting from the denial of rehearing en banc) (collecting criticisms of *Lemon* by both Justices and the legal academy). But many lower federal courts, including the court of appeals in this case, nevertheless look to *Lemon* for guidance, and they will continue to do so until this Court expressly says they should not. *See, e.g.*, *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d Cir. 2011); *DeWeese*, 633 F.3d at 431.

The Court should therefore grant certiorari in this case to jettison the *Lemon* test. When considering whether to overrule one of its decisions, the Court engages in "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion). The Court asks, for instance, whether the existing rule

> has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to

> have robbed the old rule of significant application or justification.

Id. at 854–55 (1992) (citations omitted).

These considerations point in favor of replacing *Lemon* with a workable, reliable standard. Justice Kennedy has stated that the "endorsement test"—that is, the *Lemon* test as supplemented by Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)—amounted to "unguided examination of marginalia," "using little more than intuition and a tape measure." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 675–76 (1989) (opinion concurring in the judgment in part and dissenting in part). And Justice Thomas has described both *Lemon* and the controlling analysis in *Van Orden* as "so utterly indeterminate that they permit different courts to reach inconsistent results," adding that *Lemon* has been relied upon only inconsistently. *Utah Highway Patrol Ass'n*, 132 S. Ct. at 15–16 & nn.3–6, 17 (opinion dissenting from the denial of certiorari); *see also Santa Fe ISD v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (noting *Lemon*'s "checkered career in the decisional law of this Court").

For years, this Court and lower courts have tried to press *Lemon* into a serviceable standard. But those efforts have not yielded a reliable doctrine, and they have encouraged prolonged, uncertain litigation. For all of these reasons, amici respectfully ask this Court to grant certiorari and disavow the *Lemon* test once and for all. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring

in the judgment) (noting the failure of previous efforts to dispense with the *Lemon* test).

III. The Court Should Adopt a Coercion Test, Rather than a Reasonable Observer Test.

Like the *Lemon* test, a "reasonable observer" test for conducting Establishment Clause analysis has been criticized by several current Justices. *E.g.*, *Utah Highway Patrol Ass'n*, 132 S. Ct. at 19 n.7 (Thomas, J., dissenting from the denial of certiorari) ("That a violation of the Establishment Clause turns on an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so, is perhaps the best evidence that our Establishment Clause jurisprudence has gone hopelessly awry."); *County of Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in the judgment in part and dissenting in part) (describing the advent of the "reasonable observer" test as a "most unwelcome . . . addition to [the Court's] tangled Establishment Clause jurisprudence"); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of rehearing en banc) (noting that this Court has not always applied the "reasonable observer" test, that some circuits appear to have rejected it in cases involving passive displays, and that the Tenth Circuit has misapplied it).

Amici share these concerns and submit that any Establishment Clause test the Court adopts should not depend on the views of a so-called "reasonable observer." It should instead recognize the historical significance of religious references and imagery in American government. *See Salazar v. Buono*, 559 U.S. 700, 719

(2010) (plurality opinion) (noting that "[t]he Constitution does not oblige government to avoid any public acknowledgment of religion's role in society"); *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) (stating that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious," adding that "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid" (citations omitted)).

After all, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (noting the "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels" (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)); Pet. App. 126a (Judge Kelly's dissent from the denial of rehearing en banc asserting that the Tenth Circuit "combine[s] *Lemon* with an endorsement spin that is tantamount to a hostile 'reasonable observer'").

A coercion-based analysis, *see County of Allegheny*, 492 U.S. at 659–63 (Kennedy, J., concurring in the judgment in part and dissenting in part), would both respect the structure of the First Amendment's two religion clauses and implement the text of the Establishment Clause consistent with its purpose and history. As

the Court has explained, "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678); *see also Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (stating that "[t]he Framers understood an establishment 'necessarily [to] involve actual legal coercion'" (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)); *Lee*, 505 U.S. at 640–42 (Scalia, J., dissenting) (discussing "[t]he coercion that was a hallmark of historical establishments of religion"). And because the type of coercion-based test that several Justices have proposed would also be substantially clearer and more workable than other suggested alternatives, it is all the more attractive in this uncertain area of the law. *See supra* Parts I, II.

CONCLUSION

The petition for a writ of certiorari should be granted.

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